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Federal Communications Commission

WASHINGTON, D.C. 20554

In re: Request of	)	
	)	
Lockheed Martin Corporation	)	Fee Control No. 9709298210183001
	)	Gen Dkt. No. 86-285
For Refund of Application Fees in Connection With Withdrawn V-Band Applications	)	

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Federal Communications Commission
Office of Secretary

To: The Commission

APPLICATION FOR REVIEW

LOCKHEED MARTIN CORPORATION

Stephen D. Baruch
David S. Keir
Leventhal Senter & Lerman PLLC
Suite 600
2000 K Street, NW
Washington, DC 20006
(202) 429 8970

Its Attorneys

November 17, 2005

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Summary

Lockheed Martin Corporation ("Lockheed Martin") seeks Commission review of the Managing Director's decision ("Decision") denying its request for refund of satellite application fees associated with nine V-band satellite applications filed in 1997. Lockheed Martin withdrew its applications, which had never been accepted for filing, because changes in FCC rules and ITU allocations effectively nullified the applications. Under FCC rules, it is entitled to a full refund of the filing fees it paid in connection with the unprocessed applications.

FCC Rule 1.1113(a)(4) requires that "[t]he full amount of any fee submitted will be returned or refunded ... [w]hen the Commission adopts new rules that nullify applications already accepted for filing, or [a] new law or treaty would render useless a grant or other positive disposition of the application." In its fee refund request, Lockheed Martin explained that post-filing rule changes made the grant of its applications an impossibility. The FCC's International Bureau itself confirmed as much in a Public Notice it issued in January 2004, following Lockheed Martin's withdrawal of its applications. In that Notice, the FCC declared that the V-band applications filed in 1997 had been effectively nullified by changes in the FCC's rules that predated the withdrawal of Lockheed Martin's applications, and stated that it would be compelled to dismiss these applications as "defective" under the new rules if they were not amended to comply with the new rules. In fact, the Bureau subsequently dismissed two such applications, as defective because of these rule changes. Thus, the rule was satisfied and the refunds should have been issued.

The Decision nonetheless suggests that no refund is warranted because the rule and allocation changes were "foreseeable" when Lockheed Martin filed its applications. The rule, however, makes no exception based on foreseeability of FCC or international actions that

"nullify" applications or render grant "useless." The rule declares unequivocally that fees "will be returned or refunded" following dismissal due to such changes.

Further, the relief that Lockheed Martin seeks here is entirely consistent both with prior decisions granting filing fee refunds and with the FCC's current rule that applies to "first-come, first served" satellite applications that are dismissed prior to acceptance for filing. The Decision asserts, however, that fee refunds are only granted in "compelling and extraordinary circumstances," but the cases cited are *fee waiver* cases, not fee refund cases applying Section 1.1113(a)(4), and thus are subject to a different standard.

Finally, the Decision errs in rejecting Lockheed Martin's argument that the FCC never began considering its applications because they were never accepted for filing. The Decision relies on inapposite cases rejecting requests for reduction or waiver of fees based *on the actual cost of processing individual applications*. In fact, save for an initial review, Lockheed Martin's applications were never processed at all. The substantive activities cited in the Decision as relating to Lockheed Martin's applications concern actions that were not undertaken to process any specific application, but to protect the overall interests of the United States.

A refund under the unique and narrow circumstances presented here is not only consistent with the fee refund rule and Commission precedent, but is the only equitable result under the Commission's policies and rules. For these reasons, the Commission should order a full refund of $765,405.

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In re: Request of	)	
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For Refund of Application Fees in Connection With Withdrawn V-Band Applications	)	

To: The Commission

APPLICATION FOR REVIEW

Lockheed Martin Corporation ("Lockheed Martin"), by counsel and pursuant to Section 1.115 of the Commission's Rules (47 C.F.R. § 1.115), hereby seeks Commission review of the May 23, 2005 decision ("Decision") of the Office of Managing Director ("Managing Director"),[1] which denied Lockheed Martin's September 13, 2002 request for refund of satellite application fees associated with Lockheed Martin's 1997 applications for authority to launch and operate nine geostationary satellites.[2] A refund under the unique and narrow circumstances presented here is not only consistent with the fee refund rule and Commission precedent, but is the only equitable result under the Commission's policies and rules. For these reasons, the Commission should order a full refund of $765,405.

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[1] Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, FCC, to Gerald Musarra, Vice President, Trade and Regulatory Affairs, Lockheed Martin Corporation, Fee Control No. 97092982101830001, dated May 23, 2005 ("Decision").

[2] On October 18, 2005, the FCC released a Public Notice announcing this decision. *See* Public Notice, DA 05-2726, "FCC Decisions of the Managing Director Available to the Public," (released October 18, 2005). This Application for Review is therefore timely filed. *See* 47 C.F.R. § 1.4(b)(4).

I. Background

Eight years ago, Lockheed Martin filed nine applications seeking authority to operate V-band satellites.[3] The FCC never placed these applications on Public Notice, the administrative step that begins the processing of an application.

Over the ensuing five years, the Commission made a series of decisions and proposals regarding spectrum use in the V-band that rendered impossible the grant of Lockheed Martin's applications as filed. In a 1998 Report and Order, the Commission designated substantially less spectrum for non-government satellite use in the 36-51.4 GHz range than Lockheed Martin had requested in each of its applications.[4] And in 2001, following global spectrum allocation and use decisions by the International Telecommunication Union's 2000 World Radiocommunication Conference ("WRC") – decisions which have the binding force of a treaty – the Commission proposed to modify its 1998 allocation decisions substantially, in a manner that was equally incompatible with Lockheed Martin's 1997 proposals.[5] These actions made clear that the original scope of Lockheed Martin's applications could not and would not be accommodated under the Commission's rules.[6]

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3 FCC File Nos. SAT-LOA-19970925-00100 through 00108.(filed September 25, 1997).

4 *Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands,* 13 FCC Rcd 24649 (1998) ("*36-51 GHz Order*"). For example, where Lockheed Martin requested the 39.5-42.5 GHz bands for its GSO downlink operations, the Commission designated only the 37.6-38.6 GHz and 40-41 GHz bands for such uses.

5 *Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands*, FCC 01-182 (released May 31, 2001).

6 Ultimately the Commission determined that the applications would be dismissed unless modified in ways that would ordinarily be considered "major amendments." *See* 47 C.F.R. § 25.116(b)(1) (an amendment will be deemed a major amendment if it increases the potential for interference, or changes the proposed frequencies or orbital locations to be used). The effect of a major amendment is that the amended application is considered to be newly filed.

As a result of all of these factors, on September 13, 2002, Lockheed Martin withdrew its applications, citing both the changes that had been made in the Commission's rules since the applications were filed, and the substantially modified international allocations. Contemporaneously with its letter withdrawing the applications, Lockheed Martin requested a refund of the $765,405 it had paid in application filing fees.[7]

On May 23, 2005, the Managing Director issued its Decision denying Lockheed Martin's refund request. Because the Decision misconstrues both the applicable rule and precedent and the grounds upon which Lockheed Martin's refund request was based, Lockheed Martin's fee refund request should be granted in full.

II. The Decision Does Not Properly Apply Section 1.1113.

The changes to the Commission's rules and the ITU allocations, which were a prime reason for the FCC's inability to act on Lockheed Martin's applications, effectively nullified the applications as filed, requiring a refund of the filing fees under the plain language of the rule. Refund Request at 3-4. Section 1.1113 of the Commission's rules, 47 C.F.R. § 1.1113, sets out the circumstances under which the return or refund of filing fees is appropriate. In pertinent part, the rule states that "[t]he full amount of any fee submitted will be returned or refunded, as appropriate ... [w]hen the Commission adopts new rules that nullify applications already accepted for filing, or [a] new law or treaty would render useless a grant or other positive disposition of the application." 47 C.F.R. § 1.1113(a)(4). The Commission has explained that Section 1.1113(a)(4) is intended to apply in cases where "action of a government entity would make the requested action impossible without regard to the merits of the application."

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[7] *See* Letter from Gerald Musarra, Vice President, Trade and Regulatory Affairs, Lockheed Martin, to Andrew S. Fishel, Managing Director, FCC, dated September 13, 2002 ("Refund Request").

Establishment of a Fee Collection Program, 2 FCC Rcd 947, 950 (1987) ("*Fee Collection Order*").[8]

The Commission itself specifically recognized, after Lockheed Martin filed its refund request, that the applications as originally filed could not be granted due to changes in its rules. Some sixteen months after Lockheed Martin withdrew its applications and requested a refund of the filing fees, the International Bureau issued a Public Notice directing the remaining V-band applicants to amend their applications within 45 days. The Public Notice acknowledged that the Commission had revised "the rules governing operations in the V-band," and stated that "[a]ny application that is not amended will be dismissed as *defective* because it does not substantially comply with the Commission's rules and regulations."[9] The "dismissed as defective" language plainly indicates that the rule changes affecting the Lockheed Martin applications fell within the scope of rule changes that "nullify" or "render useless" a pending application under Section 1.1113(a)(4). The Commission therefore made it absolutely clear in the V-band Public Notice that the V-band applications originally filed in 1997 had been nullified by changes in the FCC's rules to such a degree that it would be compelled to dismiss as defective under the new rules any application not brought into compliance through amendment.[10] Indeed, it would not be credible

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[8] The rule has been applied on a number of occasions in a variety of circumstances. *See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commerical Broadcast and Instructional Television Fixed Service Licenses,* 13 FCC Rcd 15920, 15957 (1998) (refunds to applicants with applications pending "up to four years or longer" were appropriate as a matter of fairness when the assignment mechanism was changed from comparative hearing to competitive bidding). *See also Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services,* 8 FCC Rcd 4161, 4164 n.28 (1993) (applicants permitted to withdraw applications and obtain refunds where Commission altered entry criteria applicable to non-commercial nationwide applicants).

[9] Public Notice, Report No, SPB-199, DA 04-234, "International Bureau Invites Applicants to Amend Pending V-Band Applications," at 1 (dated January 29, 2004) (emphasis added).

[10] *Id.* At least three applications were dismissed in this manner when the applicants did not amend their pending proposals as required. *See* Public Notice, Report No. SAT-00205, DA 04-942 (released

to suggest that an application that would be "dismissed as defective" due to a series of rule changes had neither been "rendered useless" nor "nullified." In other words, the Commission acknowledged unequivocally that changes in the V-band rules rendered impossible the grant of any of the V-band applications filed in 1997, which included Lockheed Martin's applications prior to their voluntary dismissal. Certainly Lockheed Martin should not be penalized simply because it recognized the only possible conclusion sixteen months earlier than the Commission did officially.

This outcome with respect to the V-band applications undermines the conclusion that the actions taken by the Commission or ITU were not significant enough "to trigger Rule 1.1113(a)(4), so as to warrant a fee refund." Decision at 2. The allocation and regulatory decisions made by these bodies had the effect of reducing the amount of spectrum available for V-band satellite use by one-third and changing the specific frequencies that satellite systems could use. These changes fundamentally affected the character and utility of the service to be provided and are therefore just the type of changes that the rule was intended to redress, mandating refunds where applicants' proposals could no longer be processed or granted under the modified rules.

Whether or not these changes may have been foreseeable does not change the impact of Section 1.1113(a)(4). The rule and cases applying it make no exception for circumstances where the Commission or international actions that "nullify" or "render useless" applications may have been foreseeable. Instead, the rule declares unequivocally that fees "*will* be returned or refunded" when a rule change nullifies the application or renders its grant useless. 47 C.F.R.

April 2, 2004) (dismissing as "defective" unamended V-band applications filed by CAI Satellite Communications, Inc., Denali Telecom, LLC, and Globalstar, L.P.).

§ 1.1113(a)(4) (emphasis added). Despite this fact, the Decision under review here relied heavily on the assertion that "Lockheed Martin was well aware when it filed its applications in 1997 that the amount of FSS spectrum available for its use could change, and that band sharing issues between GSO and NGSO systems would have to be resolved." Decision at 2-3. While implicitly acknowledging that substantial changes in the Commission's rules occurred which altered the location, amount and utility of spectrum available for the type of service proposed by Lockheed Martin, the Decision's rationale essentially asserts that these significant changes do not trigger the rule simply because they were foreseeable at the time the applications were filed. The rule plainly does not require that the triggering changes in FCC rules, or U.S. laws or treaty obligations, must have been unforeseeable at the time of filing, but merely that they render the application no longer viable under FCC rules.

The interposition of such a requirement – assuming *arguendo* that such an imposition was even within the scope of delegated authority – places an unreasonable burden on applicants who paid substantial filing fees to seek authority to provide services for which rules, and even spectrum allocations, had not been established. Going forward, it also would place the Commission in the unenviable position of consistently having to interpret whether a given change of law was "foreseeable." For example, in circumstances where a change in the amount of available spectrum may have been foreseen, the Commission could be forced to decide whether an unexpected change in the actual frequency bands available would warrant a refund. The Commission should adhere to the clear and binary language of the rule – do the rules changes "nullify" or "render useless" the original application? – if so, the Commission is required to refund the fees.

The inappropriate emphasis on the foreseeability of a rule change is further undermined by cases relied upon elsewhere in an effort to distinguish Lockheed Martin's circumstances from other situations where refunds were granted. The Decision cites the dismissal of numerous applications for Multiple Address Systems (MAS) in 1998 as a circumstance where refunds were appropriate because dismissal of the applications was "unambiguously compelled" due to a change in the assignment mechanism from random selection (lottery) to competitive bidding (auction). Decision at 4, *citing, e.g., Amendment of the Commission's Rules Regarding Multiple Address Systems,* 13 FCC Rcd 17954, 17957 (WTB 1998) ("*MAS Order*"). In fact, however, the possibility of the FCC assigning new licenses via auction was easily foreseeable in early 1992, when the MAS applications were filed. The idea of assigning new licenses via this mechanism was widely debated during the late 1980s, President Reagan proposed spectrum auctions as part of the fiscal year 1989 budget, and legislation to require the FCC to use auctions to assign licenses was introduced in both the 101st and 102nd Congresses. *See, e.g., Spectrum Assignment Improvements Act of 1989*, S. 170, introduced January 25, 1989. At the time that the MAS Public Notice was issued in late 1991, at least two bills were pending in Congress to require that most applications be assigned via auction. One of these stated simply, "[t]he Commission shall use competitive bidding for awarding all initial licenses or new construction permits." *See Emerging Telecommunications Technologies Act of 1991,* H.R.1407 (introduced March 12, 1991)

Indeed, the relief that Lockheed Martin seeks here is entirely consistent with prior decisions granting filing fee refunds. For example, in the *Private Land Mobile Order,* the Commission granted fee refunds to applicants in the 200 MHz band when it imposed stricter entry requirements for such applicants – requiring actual presence in the market of application

rather than merely a long-term business plan to show presence.[11] The Decision states that the facts of this case "are completely distinguishable" from Lockheed Martin's situation (Decision at 3 n.11), but tellingly does not elaborate. In fact, however, the facts are strikingly similar – in both cases, applications were rendered defective by changes to the Commission's rules, and would have been dismissed if the applicants had not withdrawn them. If the *Private Land Mobile* applicants were entitled to a refund, Lockheed Martin is as well.[12]

Lockheed Martin has been unable to locate a single case applying section 1.1113(a)(4) that would support denying Lockheed Martin a fee refund.[13] The cases where fee refunds have been denied under section 1.1113(a)(4) are distinguishable – such as the *Cellular Rural Service Areas* case where second-round cellular lottery applications were dismissed and refunds denied because the applicants had received the benefit from their filing fees of being able to participate in the first-round lottery.[14] Similarly, the denial letter spends a great deal of effort crafting an argument that fee refunds should only be granted in "compelling and extraordinary circumstances," but does so based on language from *fee waiver* cases, not cases interpreting

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[11] *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Service,* 8 FCC Rcd 4161, 4164 n.28 (1993).

[12] The Decision states that there is a need for "compelling" circumstances to warrant a fee refund-such as where a "change of law completely terminates the Commission's authority to process the pending applications." Decision at 5. The rule does not include such a requirement, however, and the rule and treaty changes at issue here would ultimately have forced the Commission to "dismiss as defective" Lockheed Martin's V-Band applications, as it did other similarly situated applications. Such a conclusion presents the same circumstances cited in orders approving refunds. As discussed in the next paragraph, the "compelling circumstances" language appears to come from a misplaced use of fee *waiver* cases.

[13] *See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commerical Broadcast and Instructional Television Fixed Service Licenses,* 13 FCC Rcd 15920, 15957 (1998) (refunds to applicants with applications pending "up to four years or longer" were appropriate as a matter of fairness when the assignment mechanism was changed from comparative hearing to competitive bidding).

[14] *Certain Cellular Rural Service Area Applications,* Order, 14 FCC Rcd 4619, *cited in* Decision at 4 n. 19. In contrast to these cellular applicants, Lockheed received no benefit from its filing fee.

section 1.1113(a)(4) governing refunds.[15] These waiver cases inherently trigger a higher standard of proof that is not relevant for the application of the refund rule in this case.

Lockheed Martin's situation satisfies not just one, but both of the circumstances under which a full refund of the filing fees it paid in 1997 is required. The International Bureau acknowledged in 2004 that the applications that had been originally filed could not be granted due to changes in FCC rules – *i.e.*, the Bureau would be compelled to dismiss them if they were not amended.[16] At the same time, the ITU's Table of Allocations no longer allowed for satellite operations in significant portions of the spectrum Lockheed Martin sought to use thus rendering substantially "useless a grant or other positive disposition of the application[s]" as originally filed. The Decision's efforts to create a foreseeability exception to this policy do not withstand scrutiny. Finally, Commission precedent fully supports a grant of a refund under the facts of this case.

III. Refund of Lockheed Martin's Application Fees Is Consistent With the Current Rules Applicable to Satellite Applications, Adopted in the Space Station Licensing Reform Order.

Not only is the refund required under Section 1.1113 of the Commission's Rules, the relief that Lockheed Martin seeks is also entirely consistent with the FCC's current rule that applies explicitly where a satellite applicant dismisses a "first-come, first served" application

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[15] Decision at 4, *citing PanAmSat Corporation,* Memorandum Opinion and Order, 19 FCC Rcd 18495 (2004) (fee *waiver* requested; section 1.1113(d)(4) regarding *refunds* not implicated); *Lockheed Martin Corporation,* Memorandum Opinion and Order, 16 FCC Rcd 12805 (2001) (same).

[16] The fact that the changes concerning the use of V-band frequencies involved both the quantity of spectrum available and its potential use actually represents a stronger case for refund than several cases cited approvingly by the Managing Director, in which refunds were granted. *See* Decision at 4. In the *MAS Order*, only the license assignment mechanism was altered, and not the fundamental rules relating to use of the spectrum. Here, in contrast, the changes affected the very substance and utility of the license sought, not just how it would be assigned.

prior to acceptance for filing.[17] Although the Commission indicated in its *Space Station Licensing Reform* ("*SSLR*") proceeding that it did not intend to apply this new fee refund rule to pending V-band applications, the sole reason provided for this treatment at that time was the fact that it did not view the V-band proceeding as a "first-come, first-served" proceeding.[18]

With respect to Lockheed Martin's particular circumstance, the Decision does not articulate a sound policy basis for denying a refund. Although the Decision includes language hypothesizing that "making it easier for applicants to receive refunds could well have the unintended or undesirable consequence[s] ... since applicants would have an incentive to file speculative applications if they could withdraw such applications and still receive a refund" (Decision at 5), no underpinning is provided for this assertion. It is not apparent how an applicant might further a speculative purpose by going to the significant effort and expense of filing a satellite application, only to dismiss it before it is even accepted for filing.[19] To benefit from speculative conduct, an applicant would presumably need to maintain its application either to secure grant for itself or to impede a competitor from securing authority.

The Commission's policy goals in the *SSLR Order* should apply with equal force here. In the *SSLR Order*, the Commission stated that the new rule was "intended to enable an applicant in

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[17] New FCC Rule 1.1113(d) explicitly provides: "Applicants for space station licenses under the first-come, first served procedure set forth in part 25 of this title will be *entitled to a refund of the fee if, before the Commission has placed the application on public notice, the applicant notifies the Commission that it no longer wishes to keep its application on file* behind the licensee and any other applicants who filed their applications before its application, and specifically requests a refund of the fee and dismissal of its application." 47 C.F.R. § 1.1113(d) (emphasis added).

[18] *See Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760, 10866 (2003) ("*SSLR Order*").

[19] This is particularly the case given the substantial fees associated with filing satellite applications, the sometimes lengthy period involved in obtaining a fee refund, and the fact that the U.S. government pays no interest on amounts it ultimately refunds to applicants. Applicants could be faced with having large sums of money tied up pursuant to a refund request for long periods of time.

a first-come, first-served procedure to obtain a fee refund in cases where an earlier-filed application would make it impossible to grant its application."[20] That is, a refund is appropriate when grant of the underlying application is no longer possible. Such a policy achieves two goals: (1) Withdrawal of the applications at the earliest possible date reduces the administrative burden on the agency and (2) New applicants are able to seek any newly available spectrum immediately.[21] The need for consistent policies is further underscored by the fact that the V-band proceeding was effectively converted from a processing round proceeding to a first-come/first-served proceeding by the *SSLR Order*; it simply happens to be the case that all of the then-pending applications were considered by rule to have been simultaneously filed first.[22] Therefore, the balance of public interest factors appears to be the same in both cases.

Aspects of the *SSLR Order* have been appropriately applied in other decisions as a justification for refunding filing fees to applicants that withdrew their applications. *See, e.g.*, Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, FCC, to Peter A. Rohrbach, *et al.*, Counsel to SES Americom, at 4 (dated March 10, 2005) (granting refund to V-band applicant for portion of fees related to withdrawn satellite applications that would have exceeded the limitation on simultaneous orbital location requests under the new rules, but were

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20 *SSLR Order*, 18 FCC Rcd at 10866.

21 The Decision includes language asserting that grant of a refund will have no impact on the number of V-Band applications because Lockheed Martin has already withdrawn them. However, Lockheed Martin withdrew the applications concurrently with the filing of its refund request, premised squarely on the application of Section 1.1113(a)(4) of the Commission's Rules. Going forward, applicants should continue to have incentives to withdraw FCC applications effectively rendered moot by the agency's actions as early as possible. In contrast, the policy implicit in the Decision does not discourage, and may reward, applicants that leave their applications on file as long as possible.

22 Lockheed Martin notes further that, through dismissal and withdrawal of the original applications, the V-band proceeding has essentially become a "first-come, first served" proceeding because only one of the original applicants remains, and any future GSO applications for this band would necessarily be subject to the "first in line" application queue.

withdrawn before the new rules were effective) ("*SES Letter*").[23] In doing so, the Managing Director did not articulate any basis for such selective application of the new rules to justify refund in some cases, but not in others. Although the Commission stated in the *SSLR Order* that it would apply the new rules "in cases where doing so will help further the goals of this proceeding to expedite service to the public and discourage speculation," there do not appear to be any clear criteria in applying this approach.

Denying a refund to Lockheed Martin also would create the wrong incentives. Lockheed Martin should not be denied a refund because it came forward and withdrew its applications in 2002, when it determined that its proposals were no longer viable. Indeed, it appears that, under the logic of the Decision and the *SES Letter*, Lockheed Martin could have received a refund by keeping its applications on file, as SES Americom had done. *See SES Letter, supra.* At a minimum, consistency should mandate a refund of the filing fees for four of Lockheed Martin's applications. The Commission should not penalize Lockheed Martin for both saving the agency the administrative burdens of keeping the applications on file and relinquishing its requests for orbital resources that are now available for other applicants.

Despite the Commission's reluctance to do so in the *SSLR Order*, there is no basis for not applying the policy behind the new rule to Lockheed Martin in this instance. As a practical matter, all of the initial V-band applications have either been accepted for filing or have been dismissed. And any new V-band applicant would be covered by the FCC's new rule. Moreover, the Commission no longer accepts satellite applications prior to the adoption of service rules, as it did at the time the V-band applications were filed in 1997. Lockheed Martin therefore is in a

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[23] Lockheed Martin notes that it sought assignments at nine orbital locations via its V-band applications, four more than are allowed under the rules adopted in the *SSLR Order*.

unique circumstance, and the Commission need not be concerned about any impact of its determination here outside the scope of the matter before it.

IV. The Commission's Actions on V-Band Rulemaking and Allocation Matters Do Not Diminish Lockheed Martin's Entitlement To A Full Refund.

Not only does the *SSLR Order* constitute strong policy support for grant in full of Lockheed Martin's fee refund request, the Decision errs in rejecting Lockheed Martin's argument that a refund is required as a matter of equity and fairness. *See* Decision at 4-5. In particular, the Decision misconstrues Lockheed Martin's argument. *See* Decision at 4. The issue is not the relative attention the Commission paid to the Lockheed Martin applications, but whether the FCC ever considered these applications at all. Because the applications were never accepted for filing, the International Bureau never took the initial step that would have permitted it to render a decision on the merits of, and take action on, Lockheed Martin's proposals.[24]

The Decision nonetheless maintains that "the Commission has clearly expended resources processing the V-band applications." Decision at 5. In fact, however, the only one of the actions cited in the Decision that is at all related to the individual applications is the statement that "the V-band applications underwent a preliminary review." *Id.* Whatever this review entailed, however, this action never resulted in the requisite acceptance of the applications for filing that would have allowed consideration of the applications. Nor did this same activity preclude SES Americom from obtaining a partial refund with respect to its V-band applications. *See SES Letter, supra.*

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[24] Under the Communications Act, an application may not be considered for grant until a thirty-day period for public comment, commencing with a Public Notice, has elapsed. As a matter of law, therefore, processing an application – the work for which an application fee is paid – does not commence until an application appears on a Public Notice as accepted for filing. Absent acceptance for filing and the issuance of a Public Notice, the Commission is not in a position to consider granting an application that has been submitted to it.

All of the other activities mentioned in the Decision concern U.S. activities before the ITU with respect to advance publication and coordination requests.[25] As the Commission has made clear, these activities are not undertaken on behalf of specific applicants, but to protect the overall interest of the United States in having orbital locations available for assignment to U.S. companies. The submission of advance publication notices and coordination requests has never been intended to reserve orbital resources for specific companies or applicants. *See Columbia Communications Corp.,* 13 FCC Rcd 17772 (Int'l Bur. 1998) (ITU filings are made "to protect U.S. interests ... and not the interests of any particular company"). Accordingly, none of the activities cited in the Decision as "processing" activities were associated with the actual consideration of Lockheed Martin's applications - the costs of which activity its application fees were intended to cover - but were instead undertaken simply to ensure that the United States would have V-band orbital resources available to assign.

As a matter of essential fairness, the Commission cannot retain a fee intended to recoup the costs of an agency service when the service that the fee was designed to recover was not performed. *See Lindy v. United States*, 546 F.2d 371, 372 (Ct. Cl. 1976) (refund ordered where inspection for which fee was paid was not performed, with the court concluding that the "[m]oneys collected therefor have been retained either for a legally void reason or for what is evidently no reason whatever").[26]

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[25] It also should not go unnoted that preparation of the advance publication and coordination filings was done by the applicants themselves in a cooperative effort to ensure that appropriate U.S. registrations were made. Although the FCC cursorily reviewed the filings for completeness and submitted the materials to the ITU's Radiocommunication Bureau, the clear majority of the preparation of the filings was done by private industry, with Lockheed Martin taking a prominent role.

[26] The case for refund is actually stronger in Lockheed Martin's case in that the collecting agency in *Lindy*, the Department of Housing and Urban Development, sent inspectors to the property involved on

V. Conclusion

For all of the foregoing reasons, Lockheed Martin respectfully requests that the Commission reverse the Managing Director's rejection of Lockheed Martin's request for refund, and order a refund in the full amount of $765,405.

Respectfully submitted,

LOCKHEED MARTIN CORPORATION

By: _____

Stephen D. Baruch
David S. Keir

Leventhal Senter & Lerman PLLC
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809

November 17, 2005

Its Attorneys

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two separate occasions, but they were unable to undertake an inspection because the plaintiff had not yet commenced construction on the property; and never began construction, leading to the refund request. *Id.* at 372. *Cf. Ranger Cellular v. FCC*, 348 F.3d 1045 (D.C. Cir. 2003) (affirming denial of refund request because affected applicants had participated in a lottery and therefore "got what they paid for").